In The
United States Circuit Court of Appeals for the Ninth Circuit.

J. A. CRESSEY,
Plaintiff in Error,
vs.
INTERNATIONAL HARVESTER COMPANY OF AMERICA, a corporation,
Defendant in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

BRIEF FOR PLAINTIFF IN ERROR.

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No. ~~2228~~ 2194

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. A. Cressey,
Plaintiff in Error,
v.
International Harvester Company of America, a corporation,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

On writ of error to the United States District Court for the District of Oregon.

ADDITIONAL STATEMENT OF CASE.

This cause was commenced in the Circuit Court of the State of Oregon for Lane County and thereafter removed to the United States District Court for the District of Oregon.

Thereafter and on the 15th day of December, 1911, plaintiff filed his amended complaint (Transcript, page 1), and thereafter and on the 15th day of December, 1911, defendant filed its answer to plaintiff's amended complaint (Transcript, page 7). No reply having been filed to the answer of the de-

fendant, on the 23d day of January, 1912, defendant filed its motion for judgment on the pleadings (Transcript, page 16); thereafter and on the 29th day of February, 1912, defendant's motion for judgment on the pleadings was sustained by the court (Transcript, page 17), and on the 29th day of February, 1912, judgment was given in favor of the defendant and against the plaintiff pursuant to the motion therefor (Transcript, page 18); thereafter and on April 22, 1912, the judgment was set aside and plaintiff permitted to file his second amended complaint (Transcript, page 19), and thereafter defendant in error filed a motion to strike out portions of plaintiff's second amended complaint, which motion was allowed, and thereafter a demurrer was filed to the second amended complaint (Transcript, page 44), and thereafter said demurrer was sustained by the court (Transcript, page 45), and the plaintiff having failed to plead further final judgment was given in favor of the defendant in error (Transcript, page 47).

POINTS AND AUTHORITIES.

I.

Judgment may be given on the pleadings. Section 79, Lord's Oregon Laws, provided as follows:

"If the answer contains a statement of new matter constituting a defense or counter claim, and plaintiff fails to reply or demur thereto within the time prescribed by law, defendant may move the court for such judgment as he is entitled to on the pleadings. * * * At any time when the pleadings in a suit or action are completed or either

party fails or declines to plead further, the court may, upon motion, grant to any party moving therefor, such judgment or decree as may appear to the court the moving party is entitled to upon the pleadings."

Wallace v. Baisley, 22 Ore. 573; 30 Pac. 472.

II.

The law is well settled that extrinsic evidence cannot be admitted to add to, contradict, subtract from or vary the terms of a written contract. The law conclusively presumes that all verbal conversations and negotiations had by the parties prior to and at the time of the consummation of the contract are included therein.

Wilson v. Deen, 74 N. Y. 531.

Looney v. Rankin, 15 Ore. 617; 16 Pac. 660.

Jungerman v. Bovee, 19 Cal. 354.

Stoddard v. Nelson, 21 Pac. 456.

Luitweiler Pumping Engine Co. v. Ukiah Water & Imp. Co., 116 Pac. 707.

Arnold v. Fraser, 117 Pac. 1064.

Atchison, T. & S. F. Ry. Co. v. Van Ordstrand, 73 Pac. 113.

Sutherlin v. Bloomer, 93 Pac. 135.

Ruckman v. Lumber Company, 70 Pac. 881.

Edgar v. Golden, 48 Pac. 1118.

Hindman v. Edgar, 17 Pac. 862.

Tyson v. Neil, 70 Pac. 791.

Williams v. Mt. Hood Ry. & Power Co., 110 Pac. 490.

Northern Assurance Co. v. Grand View Building Association, 183 U. S. 308.

Potomac S. B. Co. v. Upper Potomac S. B. Co., 109 U. S. 672.

Emerson v. Slater, 22 How. 28.

Olricks v. Ford, 23 How. 49.

Dewitt v. Berry, 134 U. S. 306.

Seitz v. Brewers Refrigerator Machine Co., 141 U. S. 510.

Bast v. First National Bank, 101 U. S. 93.

Blevin v. New England School Co., 23 How. 420.

Baker v. Nachtriat, 19 How. 126.

The case of Looney v. Rankin, supra, was an action similar to the one at bar. In that action the plaintiff, Looney, signed an agreement containing the following clause:

"And I further agree to render to M. B. Rankin my full time and the time of my son Roberts at any labor he may direct for the term of twelve months from the 9th day of this month."

In that action plaintiff attempted to show that he was to receive additional consideration from that mentioned in the writing. In discussing the matter the court uses the following language:

"The fact that parol evidence can not be used for the purpose of contradicting, adding to, sub-

tracting from or varying the terms of a written contract, or to control its legal operations or effect, except to impeach it for fraud or reform it for accident or mistake is too well settled to require citations of authorities to support it. Another equally well settled principle kindred to the one above stated is that all oral negotiations or stipulations between the parties preceding or accompanying the execution of a written instrument are regarded as merged in it. The reason of the rule is explained by judges and text writers, and is that parties making a written memorial of their transaction have implicitly agreed that, in event of any misunderstanding, that writing should be referred to as proof of their act and intention; that such applications as arose from the paper, by just construction or legal intendment, should be valid and compulsory on them, but that they would not subject themselves to any stipulations beyond their contract, because if they meant to be bound by any such they could have added them to their contract and thus have given them a clearness, a force and a directness which they would not have by being trusted to the memory of a witness. And where a written contract appears on its face to be complete, the rule here referred to, so far as it extends, is inflexible."

In the same case the court also uses the following language:

"Upon the face of the writing it appears inferentially at least that the labor so to be rendered was intended as a further consideration for the cancellation of the debt, and proof of the parol agreement whereby Rankin was to pay $600 therefor contradicted the terms of the writing, and the proof

was not admissible, and the Circuit Court committed an error in admitting it. 'The rule that parol evidence cannot be admitted for such purpose is a wholesome and righteous one and should not be relaxed.'"

In the case at bar the contract entered into between the parties in 1908 provided for a salary of $125 per month. Plaintiff alleges that his contract made in 1909 (Transcript, page 33) was entered into only in accordance with defendant's custom and practice in having its collection agents sign its said printed contract annually in July or August. The contract entered into in August, 1909, provided for a salary of $137.50 per month instead of $125 per month provided for in the preceding contract, and this contract therefore was not made as a matter of "custom," as plaintiff alleges, but for the purpose of providing an increase in plaintiff's salary.

Counsel for plaintiff in error cites in his brief several Pennsylvania cases on the question of parol and written contracts. Pennsylvania decisions on this question are not in harmony with the great weight of authority, and it is stated in Note 487 Cow. & H. to 2, Phil. Ev. 650, that "Pennsylvania cases on the subject of the rule of evidence in respect to written instruments are not always safe guides when inquiry is merely as to the rule of law."

In the case of Bast v. Bank, 101 U. S. 93, the Supreme Court of the United States says:

"It is not always easy to determine when in Pennsylvania parol evidence is admissible to explain a written instrument, but in Ansbach v. Bast, 53 Pa. St. 356, it is expressly declared that 'no case

goes the length of ruling that such evidence is admitted to change the terms itself without proof or even allegations of fraud or mistake.' "

In the case of Stoddard v. Nelson, 21 Pac. 456, the Supreme Court of the State of Oregon says:

"The rule of law is too well settled to admit of controversy that extrinsic evidence is not admissible to either contradict, add to, subtract from or vary the terms of a written contract."

The court further states as follows:

"It is not possible, without doing violence to principles as old and firmly fixed as the common law itself, to escape the force and effect of these authorities. It is true their appliaction in this particular case may work hardship on the plaintiff, but he was familiar with the law and could have readily protected himself by ingrafting a stipulation into the written lease."

In the case at bar Cressey signed two written instruments, both of which provided that he should devote his whole and undivided time to the business of the company and perform such duties and at such places as it might from time to time direct, and no mention is made in either contract concerning a "bonus" or "commission." The parties had every opportunity to include any agreements for commissions in their written contract, and to hold now that Cressey could prove a verbal contract to the effect that he was not to devote his whole time and attention to the service of the company in consideration of a salary of $125 per month (later $137.50) would be to open the door for fraud and perjury, and would also destroy the safety that exists when parties have reduced their agreements to

writing, and make such agreements of no more effect than verbal conversations. Plaintiff in error is a man versed in business affairs, and is, he states, very competent. There is no reason why the alleged verbal contract which he pleads should not have been incorporated into some of the written instruments executed by the parties.

The stability and safety of business transactions demand that written instruments should not be set aside at the will of a contracting party except for fraud or mistake. By reducing their agreement to writing the parties have agreed that the written instrument shall be referred to by them for proof as to the terms of their stipulations.

This is not a suit to correct a mistake nor to reform a written instrument. Plaintiff in error does not allege nor claim any mistake in the written contract, nor does he seek to reform the same; neither does he claim nor allege any fraud. He is seeking to enforce an alleged parol agreement whose terms are contradicted by the written instrument.

Further comment on the decision of the Supreme Court of Pennsylvania on the question of parol evidence where written documents are attacked is made by the Kansas Supreme Court in the case of Atchison, T. & S. F. Ry. Co. v. Ordstrand, 73 Pac. 113. The following language is used:

"But the rule excluding parol evidence to vary written contracts has never obtained in that state. * * * Therefore the decision quoted from can not be followed."

The Kansas court further states:

"That if the alleged verbal promise existed at all it existed as part of the negotiation which was finally concluded by writing of a different purport, which writing was willingly executed with full opportunity and knowledge, and therefore with full knowledge of its conditions."

The court further states:

"The plaintiff's pleadings and the findings of the jury therefore presented a simple case of an attempt to supplement a written contract by parol evidence so as to extend its terms to cover a matter which the instrument itself excluded."

In the case of Smith v. Caro & Baum, 9 Ore. 282, the Supreme Court uses the following language:

"This rule of evidence which inhibits proof of a contemporaneous parol agreement to vary or contradict a written instrument, is conceded to be of the utmost importance in the administration of justice. It is founded upon the principle that all previous and contemporaneous negotiation and discussion upon the subject are merged in and extinguished by the writing and cannot be shown to vary or contradict it; the mischief which would result from a lax application of the rule are too many and manifest to require illustration. That conditions in written instruments may be waived by subsequent oral agreements without violating this principle of evidence is not questioned, but not by prior or contemporaneous verbal agreements."

III.

The alleged agreement is within the statute of frauds.

Plaintiff contends that the alleged agreement was entered into in July, 1908, and was, he states, to be performed between January 1, 1909, and January 1, 1910; it was therefore an agreement not to be performed within a year and void under the statute of frauds because not in writing.

Recovery for services rendered under a contract not enforcible because within the statute of frauds can only be had upon a quantum meruit.

Am. & Eng. Ency. of Law (2d ed.), Vol. 29, page 839.

Albee v. Albee, 3 Ore. 321.

Wallace v. Long, 105 Ind. 522.

Williams v. Bemis, 108 Mass. 91.

Koch v. Williams, 82 Wis. 186.

Cohen v. Stein, 61 Wis. 508.

Lapham v. Osborne, 20 Nev. 168.

King v. Benson, 22 Mont. 256.

Stevens v. Lee, 70 Texas, 279.

Sims v. McEwen, 29 Ala. 184.

Patten v. Hicks, 43 Cal. 509.

Hillhouse v. Jennings, 60 S. C. 373; 38 S. E. 599.

Gazzam v. Simpson, 114 Fed. 71.

IV.

The consideration of a written contract cannot be impeached by an alleged prior or contemporaneous parol agreement.

A party has the right to make the consideration of his agreement the essence of the contract, and when this is done the consideration for the contract with reference to its conclusiveness must stand upon the same footing as its other provisions, and accordingly cannot be affected by the introduction of parol or extrinsic evidence.

17 Cyc. 661.

Hilgar v. Miller, 42 Ore. 55; 72 Pac. 319.

Walter v. Deering, (Tex. Civ. App.) 65 S. W. 380.

Cheeseman v. Nicholl, 70 Pac. 797.

Ind. Union R. Co. v. Houliham, 157 Ind. 494; 60 N. E. 943; 54 L. R. A. 787.

Trice v. Yoeman, 57 Pac. 955.

Sayre v. Burdick, 47 Minn. 367; 50 N. W. 245.

Sutherlin v. Broomer, 93 Pac. 134.

In the case of Sutherlin v. Bloomer, above cited, the Supreme Court of Oregon held that where a statement in a written instrument as to the consideration is of a contractual nature, as where the consideration consists of a specific contract and promise to pay one of the parties to perform certain acts, it cannot be changed or modified by parol or extrinsic evidence.

In the case of Trice v. Yoeman, supra. the court says in referring to the written instrument:

"In addition to the express mention of the sums to be paid, which of course implies the exclusion of an obligation to pay any greater or any other sums

and negative by their terms the obligation to pay anything additional. * * * These instruments not only constitute a contract to convey lands for a certain specified consideration but they in terms exclude the right to claim additional compensation for the conveyance."

The test of the admissibility of parol evidence where there has been a written agreement is whether or not the consideration expressed in the writing is by way of recital or whether it is contractual, and where the consideration is a matter of contract and the language used shows that it was plainly intended to conclusively show the full consideration, parol agreements are never admissible to impeach a written instrument, or vary, or contradict, or add to its terms. Where the parties have made the consideration in a written instrument contractual it becomes of the essence of the contract the same as any of its other provisions, and is subject to the same rules when attacked by parol evidence.

V.

The alleged parol agreement is not collateral to the written instrument.

The alleged parol agreement is not shown to be a collateral contract, but pertains to and involves the same services mentioned in the written personal service agreement, in which agreement plaintiff was to devote to the company his entire time and attention and perform such services for them as directed, and in fixing his per cent cost for the alleged "bonus" he includes the salary referred to in the written contract as part of the expenses, which conclusively shows that the services for

which he claims a "bonus" are the identical services which are provided for in the contract.

Plaintiff's second amended complaint clearly indicates that the services which he performed under the terms of his written contract, and for which he was paid a salary, are the identical services for which he now claims additional compensation, notwithstanding the fact that his contract provided that the salary should be **in consideration** of all services performed. The contract therefore makes this salary consideration of the essence of the contract, and defendant's promise to pay this salary is contractual, is the part of the contract to be performed on the part of the company and is not a matter of recital or acknowledgment. There was clearly a meeting of the minds of the contracting parties, and plaintiff was to perform such services as directed, the defendant to pay therefor the stipulated salary. Defendant cannot now claim that he was not to perform such services as directed, and that the services which he alleges as the basis of the alleged parol agreement were not included in the written contract. In computing the amount of his alleged "bonus" plaintiff uses as a basis the identical services provided for in the written contract and the salary paid him therefor, and the alleged parol agreement therefore does not involve a matter collateral to that provided for in the written contract, but involves the same matter, and this is shown by the pleadings.

VI.

The alleged agreement claimed by plaintiff is void for want of mutuality.

Rose v. Oliver, 32 Ore. 447; 52 Pac. 176.
Reid v. Savage, (Ore.) 117 Pac. 306.
Gaines v. Vandecar, (Ore.) 115 Pac. 721.

Plaintiff in error contends that defendant promised to pay him a certain bonus provided he would enter into its employment and remain during the entire year of 1909, but Cressey never at any time agreed with defendant that he would remain in its employ during the entire year of 1909; in fact, the written contract expressly provides that the agreement may be cancelled by either party thereto by giving written notice. There was, therefore, no consideration for the alleged promise of the Harvester Company to pay Cressey the bonus he claims. The alleged agreement is clearly unilateral and void for want of mutuality.

The case of Rose v. Oliver, above cited, which arose over an alleged agreement wherein it was claimed that one of the parties agreed that if his nephew would come to live with or near him so as to be accessible for help in case of emergencies, or when required by the uncle, that the uncle would devise his property to the nephew by last will and testament, and the court held that although the nephew lived with or near the uncle for a considerable portion of the time, inasmuch as he had never promised or agreed with the uncle that he would live with or near him the contract was void for want of mutuality and could not be enforced.

VII.

Usage cannot be shown to vary or contradict the express terms of a contract.

McCulsky v. Klosterman, 20 Ore. 108; 25 Pac. 366.

Holmes v. Whitaker, 23 Ore. 319; 31 Pac. 705.

VIII.

Plaintiff does not allege compliance with the alleged parol offer.

Plaintiff did not come within the conditions of the alleged contract, as his expense did not come within the schedule as pleaded and his per cent cost was greater than the standard fixed. Plaintiff alleges that the per cent cost on cash collected from January 1, 1909, to September 1, 1909, was not to exceed 7 per cent; that the per cent cost on claims secured was not to exceed 5 per cent during the same period. He states that the amount of notes and claims of said company secured and renewed during this period was $12,340.05; that the total amount of expense incurred by him in making collections and procuring renewals, including his salary, was $1590.41. His expense, therefore, was approximately 7.5 per cent of the amount of notes and claims secured during said period.

Plaintiff alleges that the total amount of claims secured by him from September 1, 1909, to January 1, 1910, was $11,290.24; that the expense incurred by him during said period was $884.47 (Transcript, page 26). The per cent cost, there-

fore, was approximately 7.8 per cent, whereas, according to the schedule pleaded (Transcript, page 25), the per cent cost was not to exceed 2 per cent during this season of the year.

Plaintiff alleges that the actual cost and expense to **defendant** was not to exceed the schedule named (Transcript, page 25), whereas he alleged in his allegations concerning actual expense "the total amount of expense incurred by **plaintiff.**" He does not allege that the figures named by him as being **plaintiff's** expenses were the only actual costs and expenses of **defendant.**

Plaintiff has not, therefore, complied with the conditions of the alleged offer of a "bonus" or "commission."

IX.

A subsequent contract entered into by the parties concerning the same subject-matter and containing terms inconsistent with those of the prior contract, modifies the prior contract by implication, and the prior contract is merged in the latter.

Vol. 9 Cyc. p. 595.

Assuming then, for the purpose of argument only, that the alleged parol agreement claimed by plaintiff to have been made in August, 1908, as he aleges, the subsequent written contract entered into in August, 1909, is clearly inconsistent with the terms of the alleged parol contract, and any agreement, either parol or otherwise, would be merged in the subsequent writing, for it concerns the same subject-matter and contains terms inconsistent with the alleged previous contract.

To recapitulate, the judgment of the District Court on the first cause of action was correct for the following reasons, among others:

(1) Plaintiff's alleged cause of action is an attempt to modify, contradict and add to the terms of a written contract by an agreement, which is conceded by him to be in parol.

(2) The alleged parol agreement for the payment of commission or bonus would be within the statute of frauds for the reason that it was not to be performed within a year.

(3) The plaintiff does not bring himself within the conditions of the alleged offer.

(4) The alleged contract for commission or bonus would be void for want of mutuality.

(5) The alleged oral agreement for commission or bonus would be merged in the two subsequent written agreements, which were inconsistent with the terms of the alleged preceding oral contract.

Second Cause of Action.

Referring to the second cause of action in plaintiff's second amended complaint it will be noticed that the contract entered into in November, 1910, provided by mutual stipulation of the parties that the defendant could "terminate the agreement at any time for neglect of duty, refusal to follow instructions, or should it consider second party's work unprofitable or undesirable, in which event compensation shall cease the day and date the agreement is terminated."

Defendant having discharged plaintiff it neces-

sarily follows that defendant considered the plaintiff's services undesirable. The right to discharge plaintiff was clearly given by the contract, which does not state that defendant must prove or establish that plaintiff's services were undesirable, but by mutual contract it is provided that plaintiff could discharge the defendant if defendant should consider his services no longer desirable, and the contract especially provides that if the defendant should consider the plaintiff's services no longer desirable "compensation should cease the day and date the agreement was terminated." In view of the plain language of the writing, to hold that defendant could not discharge the plaintiff when it considered his services no longer desirable, would, it seems, deny the parties the right to contract.

In a bond reading that it will be redeemed if desired twelve years after date, "desired" is a synonym for "wished for" and gives the option of redemption to the holder.

> Allentown School District v. Derr, 115 Pa. 439; 9 Atl. 55 and 56.

"Desired" is defined by the Standard Dictionary as "an earnest wishing for something," "a longing," "a craving."

From the plain wording of the contract, obviously it was intended that the Harvester Company was not to be obligated to retain Cressey in its employ any longer than it desired his services.

The cases cited by plaintiff in error are principally cases where work, labor and materials have been furnished, and the product was to be satisfactory to the other party. A different phase is

presented where a party has furnished either labor or materials which are of a benefit to him, and he is not allowed to declare them unsatisfactory without reason therefor. For instance, where a building constructed is to be approved by the architect, payment cannot be avoided by refusal of the architect to be satisfied unless he has a reason therefor.

The case of Parlin, etc. v. City of Greenville, 127 Fed. 55, cited by plaintiff in error, was a case where a structure had been completed and the same was to be satisfactory to the city, and it is therefore not in point here, for that was an executed contract.

The case of Beissel v. Vermillion Farmers Elevator Co., 113 N. W. 575, cited by appellant, is not in point for the reason that that was a definite contract for a year, and the services in that case were to be "satisfactory" instead of "desirable."

The following authorities hold that when a contract provides by its terms that a master may discharge a servant when his services are not "satisfactory" the court has no authority to investigate or determine the question of whether or not the master had reasonable grounds upon which to base his dissatisfaction:

Allen v. Mutual Compress Co., 101 Ala. 574; 14 So. 362.

Bush v. Koll, 29 Pac. 919.

Teichner v. Pope Mfg. Co., 125 Mich. 91; 83 N. W. 1031.

Rossiter v. Cooper, 23 Vt. 522.

Cline v. Libby, 49 N. W. 832.

Gibson v. Crandage, 33 Amer. Reports 351.

McCurren v. McNulty, 7 Gray 139.

Tyler v. Ames, 6 Lans. 280.

In an action by a servant against the master for breach of contract for wrongful discharge he must allege in his complaint his own willingness to render further services and to perform the contract at the time of the alleged breach.

Marx v. Miller, 134 Ala. 347; 32 So. 765.

Quick v. Swing, 53 Ore. 149; 99 Pac. 418.

In the case of Quick v. Swing, above cited, the plaintiff failed to allege in his complaint that he had been damaged, and while judgment was sustained in the absence of a demurrer it is intimated that if the complaint had been attacked by demurrer the objection would have been well taken.

Plaintiff does not in any part of his cause of action allege that he was ready and willing to continue in the employment of the defendant, or ready and willing to perform the work required, which allegations are required in actions of this character.

In an action for the wrongful discharge of a servant the action is founded upon damage for breach of contract, and suit cannot be maintained to recover wages.

Winkler v. Racine Wagon Co., 99 Wis. 184; 74 N. W. 793.

26 Cyc. 1002.